ALGEMENE BANK NEDERLAND N.V.

v.

METROMEWAH SDN. BHD. & ORS.

HIGH COURT MALAYA, KUALA LUMPUR
ZAKARIA YATIM J
[SUIT NO. D4-22-(23)-1022-88]
10 MAY 1991

CIVIL PROCEDURE*: Injunction - Mareva - Good arguable case - Assets within jurisdiction - Risk of assets being removed.*

BANKING: *Letter of credit - Irrevocable - Collecting or confirming bank - Presentation of documentary credits to issuing bank - Advising or negotiating bank.*

By an agreement dated 22 October 1986 the plaintiff bank ABN agreed to negotiate export bills, private export credit re-financing and generally provide banking facilities to the 1st defendant limited company, D1. The 2nd, 3rd and 4th defendants, D2 to D4, jointly and severally guaranteed to ABN all sums owing to ABN from D1. D4 was the chairman of D1.

On 21 August 1987 D1 presented 3 sets of export documents to ABN for negotiation against a documentary credit issued by Deutsche Bank AG, Essen, Germany. As a result of ABN's negotiations, D1's account with ABN was credited with the sum of RM403,990 on the understanding that ABN would be reimbursed by Deutsche Bank.

However, Deutsche Bank rejected the export documents and ABN had to reverse the credit entry of RM403,990. ABN also recalled the banking facilities and demanded repayment of sums in which were in debit in the account less amounts realised by the sale of securities furnished by D1.

As the defendants failed to pay the sum demanded, ABN applied and obtained a Mareva injunction against D4, who was a chairman of D1. This was the application by D4 to set aside the Mareva injunction.

The issue before the Court was whether on the affidavit evidence, ABN had a good arguable case, whether ABN had produced evidence that D4 had assets within jurisdiction and whether there was a risk of the assets being removed before judgment could be satisfied. The Court also had to decide whether ABN was a confirming bank or an advising or negotiating bank.

Held:

[1] From the documentary evidence adduced by the parties, namely the agreement between the parties and the documentary credit issued by Deutsche bank, where ABN is referred to as the "Advising Bank", there was a good arguable case that ABN was a negotiating bank and not a confirming bank.

[2] Although the guarantee was not exhibited at the *ex parte* application, it was referred to in the affidavit in support of the application and in the statement of claim; it was quite proper for ABN to introduce it during the *inter partes* stage.

[3] As there was no dispute of D4's ownership of certain properties, the Court was satisfied that D4 had assets within the jurisdiction.

[4] The fact that D4 had absconded was sufficient ground to allow the Mareva injunction to continue until the trial of this action.

[D4's application dismissed.]

Cases referred to:
Bank Bumiputra Malaysia Bhd. & Anor. v. Lorrain Osman & Ors. [1985] CLJ (Rep) 409
United City Merchants (Investments) Ltd. v. Glass Fibres & Equipments Ltd. [1983] AC 168
Bailey & Co. Ltd. v. Balholm Securities Ltd. [1973] 2 Lloyds Rep 404
Pac Asian Services Pte. Ltd. v. European Asian Bank AG [1989] 3 MLJ 385
Ninemia Maritime Corp. v. Trave Schiffahrtsgesse - llschaft mbH & Co. KG. [1984] 1 All ER 398

For the plaintiff - K. Anantham; M/s. Skrine & Co.
For the defendants - Micheal Lim; M/s. Shook Lin & Bok

JUDGMENT

Zakaria Yatim J:

This is an application by the fourth defendant in this action for an order that:

(1) the *ex parte* order for interim injunction dated 5 May 1988 and amended on 13 May 1988 be set aside;

(2) damages on the plaintiff's undertaking be assessed by the Senior Assistant Registrar and paid by the plaintiff to the fourth defendant; and

(3) the costs of and incidental to this application be taxed and paid by the plaintiff to the fourth defendant.

The *ex parte* order obtained by the plaintiff on 5 May 1988, *inter alia* states:

> **It is Ordered and Directed** that the 4th defendant whether by himself or by his servants and/or agents or otherwise howsoever be restrained, and an injunction is hereby granted restraining him from selling, transferring, assigning, disposing, pledging, charging or otherwise dealing with his two properties known as HS (D) 22316, PT No. 39313, Mukim of Kuala Lumpur, State of Wilayah Persekutuan and QT (R) No. 900 L.O. No. 11296, Mukim of Kuala Lumpur, State of Selangor, until execution by the plaintiffs of any judgment they may obtain against the defendants in this action or until further order.

The said order was amended on 13 May 1988 and the amendment reads as follows:

> **It is Ordered** that the plaintiffs be and are hereby at liberty to amend the order of this Honourable Court dated 5 May 1988 by deleting "HS (D) 22316" and "QT (R) 23316" and "QT (R) No. 9000" as stated in lines 2 and 4 respectively on p. 2 of the said order.

The plaintiff is a branch office of an international banking institution having its registered office at 16-2, Jalan Raja Laut, Kuala Lumpur. The first defendant is a private limited company having a place of business at No. 37-M, Jalan Manis 7, Cheras, Kuala Lumpur. The fourth defendant was at all material times the Chairman of the first defendant.

By a letter agreement dated 22 October 1986 the plaintiff agreed, subject to the terms and conditions in the agreement, to negotiate export bills, provide export credit re-financing and generally provide banking facilities to the first defendant. By a letter of guarantee dated 16 October 1986, the second, third and fourth defendants jointly and severally agreed to pay, on demand, to the plaintiff all sums owing to the plaintiff from the first defendant together with interest and all bank charges.

According to the statement of claim, on 21 August 1987, the first defendant presented three sets of export documents to the plaintiff for negotiating against a documentary credit issued by Deutsche Bank AG, Essen, Germany. The plaintiff negotiated resulting in the first

defendant's account with the plaintiff being credited in the sum of RM403,990 on 21 August 1987 on the understanding that the plaintiff would be reimbursed by the said Deutsche Bank. The said Deutsche Bank rejected the said export documents when presented by the plaintiff resulting in the plaintiff reversing the credit entry of RM403,990 on 21 August 1987. The first defendant's account on being debited for the sum of RM404,128 on 2 September 1987 resulted in an unauthorised debit which, as at 8 September 1987, stood at RM446,385.41 in the first defendant's current account. The plaintiff immediately recalled the banking facilities afforded to the first defendant and demanded repayment by the first defendant for the said sum of RM404,128 through its solicitors' letter dated 16 December 1987. No payment was made by the first defendant. By reason of the realisation of securities furnished by the first defendant to the plaintiff, the first defendant as at 1 March 1988 was indebted to the plaintiff in the sum of RM230,955.64 with interest at 12.5% continuing to run on this sum from 1 March 1988 to date of payment. Alternatively the plaintiff averred that the facilities afforded by the plaintiff to the first defendant expired by effluxion of time on 16 September 1987 and as at 28 February 1988 the first defendant was indebted to the plaintiff in the sum of RM228,684.48 inclusive of interest. The plaintiff, through its solicitors, demanded payment of the said sum of RM230,955.64 from the defendants but the defendants failed to pay the said sum or any part thereof.

It is not in dispute that the *ex parte* order as amended which the fourth defendant seeks to set aside is a Mareva injunction.

The issue before the Court is whether, on the affidavit evidence, the plaintiff had a good arguable case; whether the plaintiff has produced evidence that the fourth defendant has assets within jurisdiction; and whether there is a risk of the assets being removed before judgment is satisfied. *Bank Bumiputra Malaysia Bhd. & Anor. v. Lorrain Osman & Ors.* [1985] CLJ (Rep) 409 at 416.

Mr. M. Nagarajah, Counsel for the fourth defendant submitted that the plaintiff was a collecting or confirming bank who presented the documentary credits to the issuing bank but the issuing bank rejected the claim. He contended that since the plaintiff had negotiated on the documents under irrevocable documentary letter of credit the plaintiff's cause of action lies against the Deutsche Bank and not against the first defendant. In support of his contention he cited *United City Merchants (Investments) Ltd. v. Glass Fibres & Equipments Ltd.* [1983] AC 168. In that case, Lord Diplock, at p. 183 of his speech, was dealing with a contractual relationship between the confirming bank and the seller under which the confirming bank undertakes to pay to the seller up to the amount of the credit.

Mr. Anantham, Counsel for the plaintiff submitted that the *Glass Fibres* case was not applicable to the present case as it dealt with a confirming bank. According to him, the plaintiff, in the present case, was never a confirming bank but was an advising bank or a negotiating bank.

In order to determine this issue, it is necessary to look at the relevant documents. The first document is the agreement dated 22 October 1986. According to this agreement, the plaintiff granted to the first defendant certain facilities including the facility for "negotiation of DP export bills on approved buyers" up to limit of RM200,000. Clause 7 of the same agreement states:

> The relevant export bills pertaining to the preshipment financing are to be channelled to us for **negotiation**. Repayment of the preshipment advance must be made before due date. (Emphasis added)

In his affidavit affirmed on behalf of the plaintiff on 14 April 1989, Encik Mohd. Annuar Noor averred:

> Whilst the letter of credit transactions mentioned in ... the statement of claim is not specifically mentioned as one of the facilities in the letter agreement, the plaintiff acted as **advising/ negotiating** bank in **negotiating** the 3 sets of export documents ... As an advising/negotiating bank, the plaintiff is an agent to the issuing bank. (Emphasis added)

The documentary credit issued by Deutsche Bank (irrevocable documentary credit No. 380/ 13.216) states, *inter alia*:

> This credit is available with any bank in Malaysia by negotiation against presentation of the following documents:
>
> - Beneficiaries' draft at sight drawn on Deutsche Bank AG, Essen.
> - Signed commercial invoice, 3-fold.
> - Grading Summary, 3-fold.
> - Certificate of origin, Form A GSP.
> - Full set of clear shipping company on board marine bill of lading, issued to on blank endorsed, notify: Kolk & Co. GmbH & Co. KG., Kaisarstr. 29,5600 Huppertal.
> - Copy of detailed cable specification of goods to be sent directly to Messrs. Huppertal, before shipment.
> - Handling list 3-fold.
> - Third party documents and third party bill of lading are acceptable.

In the document, the plaintiff is referred to as the "advising bank". Subsequently the document was amended by telex from Deutsche Bank to the plaintiff. At the bottom of the telex there is an endorsement by the plaintiff and it reads as follows:

> This message is authenticated. We are advising this amendment without any **engagement** on our part. (Emphasis added).

From the documentary evidence referred to above, there is a good arguable case that the plaintiff is a negotiating bank and not a confirming bank. In *Bailey & Co. Ltd. v. Balholm Securities Ltd.* [1973] 2 Lloyds L Rep 404, the sellers drew bills of exchange in accordance with the letter of credit on the Bangkok Bank. This was pursuant to the opening or irrevocable letters of credit in favour of the sellers by a merchant bank in London. The letters of credit provided that drafts were negotiable by the Bangkok Bank at the right rate, interest to be claimed from the Merchant Bank. The sellers negotiated the bills at the right rate with the Bangkok Bank and delivered to them the bills and shipping documents. The Bangkok Bank, to whose orders were made, presented the bills which were accepted in exchange for the shipping documents. The bills, however, were dishonoured when presented for payment. The bills were protested and the Bangkok Bank sought recourse against the sellers. The Court held that the Bangkok Bank, by negotiating bills at the right rate did not thereby confirm the letter of credit. The Court also held that to the extent that the Bangkok Bank had not confirmed the letter of credit it had merely acted as an advising bank.

In the present case the fourth defendant guaranteed the said facilities. Mr. Nagarajah submitted that the guarantee was not disclosed to the Court by the plaintiff at the time of the *ex parte* application. I have examined the affidavit in support of the *ex parte* application and I find that reference was made in the affidavit to the letter of guarantee dated 16 October 1986. The statement of claim also referred to the said guarantee. The plaintiff did not exhibit the guarantee to the affidavit in support of the *ex parte* application. However the guarantee

was exhibited to a subsequent affidavit filed by the plaintiff. The guarantee was before me at the *inter parte* hearing. Although the guarantee was not presented at the *ex parte* application it was quite proper for the plaintiff to introduce it during the *inter parte* stage. See *Pac Asian Services Pte. Ltd. v. European Asian Bank AG* [1989] 3 MLJ 385 at 391.

The next point to consider is whether there is evidence that the fourth defendant has assets within jurisdiction. According to the plaintiff's affidavit in support of the *ex parte* application, the fourth defendant is the owner of two pieces of properties bearing Lot No. HSD. 22316, PT No. 3931B in the Mukim of Kuala Lumpur and QT(R) No. 900 Lt No. 11296, Mukim of Kuala Lumpur. This has not been disputed by the fourth defendant. I am satisfied therefore that the fourth defendant has assets within jurisdiction.

The other point to consider is whether there is a risk of the assets being removed before judgment is satisfied. According to the affidavit in support of the *ex parte* application the plaintiff alleged that the fourth defendant had absconded and would dispose the assets. Paragraph 15 of the said affidavit states:

> I say that since the claim made by the plaintiffs against the 4th defendant, the 4th defendant has absconded. I say that by reason of the position held by the 4th defendant in the 1st defendant; the deceit perpetrated by the 1st defendant on the plaintiffs, no doubt, with the knowledge of the 4th defendant, I have reason to believe that unless restrained by an order of Court, the 4th defendant is likely to dispose, or deal with his assets in a manner designed to defeat any judgment that the plaintiffs may untimely obtain against the 4th defendant.

The fact that the fourth defendant has absconded is sufficient ground to allow the Mareva injunction to continue until the trial of this action. See *Ninemia Maritime Corp. v. Trave Schiffahrtsgesse - llschaft mbH & Co. KG.* [1984] 1 All ER 398 at 406.

For the reasons stated above I dismiss the application with costs.

Also found at [1991] 2 CLJ 1493